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Constitutional Considerations of the Children's Television Act of 1988: Why the President's Veto Was Warranted

by DAVID S. VERSFELT*

In the years since the 1984 Broadcast Deregulation Order[1] of the Federal Communications Commission ("FCC"), Congress has addressed a multitude of proposals regarding children's television.[2] Numerous bills introduced in both the House and Senate have, in one or more ways, sought to reinstitute some sort of governmental supervision over the content of children's programming and the advertising that supports it.[3]

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1. The Revision of Programming and Commercialization Policies, Ascertainment Requirements and Programming Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076 (1984) [hereinafter *"1984 Deregulation Order"*]; Memorandum Opinion and Order on Reconsideration, 104 F.C.C.2d 358 (1986), *rev'd in part sub nom*, Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

2. The term "children's television" is typically used to refer to broadcast television programming intended to be viewed primarily by an audience of children. Ironically, the term is in many ways a misnomer. For example, many prime-time programs attract an audience that consists largely of youthful viewers, and those same programs are often seen by more children than programming presented during the daytime hours. Herein, the term "children's television" will be used in the sense it appears in the Children's Television Act of 1988, *i.e.*, to refer to broadcast programming disseminated for viewing by audiences consisting of children under the age of 12.

3. These proposals have included limiting the quantity of advertising allowed during children's programming; eliminating so-called "program commercials"; requiring licensees to provide a minimum of seven hours per week of educational and informational children's programming; and requiring the FCC to analyze, during license renewal review, whether a television licensee is serving "the educational and informational needs of children in its overall programming." *See* H.R. 3966, 100th Cong., 2d Sess., 134 Cong. Rec. H3979-80 (daily ed. June 7, 1988) (Children's Television Act of 1988); H.R. 3216, 99th Cong., 1st Sess. (1985), S. 1594, 99th Cong., 1st Sess. (1985) (The Children's Television Educational Act of 1985); H.R. 3288, 100th Cong., 1st Sess. (1987) (The Children's Television Advertising Practices Act of 1987). It is reasonable to expect that many, if not all, of these issues will be raised in Congress during 1989.

While most of these bills have failed even to emerge from committee, much less to earn the support of a majority of the Congress, in late 1988 Congress enacted the Children's Television Act of 1988 (the "Act")[4] by a relatively wide margin.[5]

The Act began its legislative journey with a number of provisions that were dropped at various points along the way, so that the final version principally consisted of two provisions. The first would have required the FCC to initiate a rulemaking proceeding to prescribe "standards" for time devoted to commercials during children's programming, with set limits applicable at least from January 1, 1990, to January 1, 1993.[6] The other provision dealt with the review of applications for renewal. It would have required the FCC to consider whether the licensee had complied with the applicable commercial time limits and "whether the licensee had served the educational and informational needs of children in its overall programming."[7]

Given the relatively limited congressional opposition to the Act, most interested parties expected President Ronald Reagan to approve the legislation. On November 5, 1988, however, the President exercised his pocket veto, tersely stating that "[t]his bill simply cannot be reconciled with the freedom of expression secured by our Constitution."[8] To the surprise of many, and the strong disappointment of a few, the legislation died.

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4. H.R. 3966, 100th Cong., 2d Sess. 134 CONG. REC. H3979-80 (daily ed. June 7, 1988) [the "Act"].

5. The House of Representatives passed the measure, 328 to 78, on June 8. 134 CONG. REC. H4010 (daily ed. June 8, 1988). The Senate gave its approval on October 19 by an unrecorded voice vote that could have been prevented, or at least delayed, if any Senator had opposed it. 134 CONG. REC. S16857 (daily ed. Oct. 19, 1988).

6. The limits are set forth in the statute as "not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays." The Act, *supra* note 4, at § 3(b). The Act granted the FCC authority to modify the time limits after January 1, 1993, following notice, public comment, and demonstration of a "need" for a change. *Id.*

7. The Act, *supra* note 4, at § 4. As originally introduced, the bill would not only have limited the advertising during "children's programming" but would have required broadcasters to air a minimum of seven hours of educational and informational children's programming per week, with five of the hours falling during weekdays. HOUSE COMM. ON ENERGY AND COMMERCE, CHILDREN'S TELEVISION PRACTICES ACT OF 1988, H.R. REP. NO. 675, 100th Cong., 2d Sess. 4 (1988).

8. Memorandum of Disapproval for the Children's Television Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1456 (Nov. 5, 1988).

A number of the proposals which played a part in the legislative journey of the Act have already been introduced this year, placing issues regarding regulation of the content and advertising of children's television once again at the forefront.[9] This Article will review some of the history and provisions of the Act and will argue that President Reagan's veto was appropriate, albeit not fully explained, because significant questions regarding the Act's purported justification and the constitutionality of certain of its restrictions existed.

The Background of the Act

The FCC has involved itself with children's programming issues for more than two decades. In 1974, Commission regulation reached a high-water mark with the *Children's Television Report and Policy Statement* (the *"1974 Policy Statement"*),[10] which concluded that broadcasters have a "special obligation" to serve children as a "substantial and important" group in the community.[11] In addition to several general programming goals,[12] the Commission set a limit of no more than 12 minutes per hour of advertising on weekday children's programs and 9.5 minutes per hour for weekend programming.[13]

In 1984, however, the FCC engaged in a broad deregulation of the television industry after determining that "marketplace forces can better determine appropriate commercial levels than our own rules," and that the policy reasons underlying many of its strict regulations were no longer valid.[14] The FCC eliminated commercialization guidelines for television, including pre-existing guidelines for advertising during children's programming.[15] With respect to advertising for children's pro-

9. Legislation identical to the Act was introduced in both the House of Representatives and the Senate in 1989. H.R. 1677, 101st Cong., 2d Sess. (1989); S. 707, 101st Cong., 2d Sess. (1989). Other, very similar legislation has also been introduced. *E.g.*, S. 1215, 101st Cong., 2d Sess. (1989).

10. 50 F.C.C.2d 1 (1974) [hereinafter *"1974 Policy Statement"*], *aff'd sub nom.*, Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

11. *Id.* at 5.

12. The general programming goals encouraged broadcasters to provide educational children's programming, expressed concern with "overcommercialization" of children's television, and requested broadcasters to separate program matter from commercial matter. *Id.* at 5-6, 10-11, 16-17.

13. *Id.* at 12.

14. 1984 Deregulation Order, 98 F.C.C.2d 1076-78, 1102 (1984).

15. The FCC's *1984 Deregulation Order* removed: (1) program guideline percentages; (2) obligations that commercial broadcasters formally ascertain important

gramming, the FCC noted "the importance of advertising as a support mechanism for the presentation of children's programming."[16]

The FCC's *1984 Deregulation Order* was based on the recognition that events since 1969 had wrought dramatic changes in how children's programming—and its attendant advertising—are disseminated. Traditionally, government regulation of the broadcasting industry has been based on the notion of the "scarce" number of available airways,[17] but this rationale is no longer valid. The children's programming available in the broadcasting world of 1974 bears little relationship to those available in the broadcast, cable, and video world of today. Developments over the past 15 years have provided a wide variety of alternatives for children; the number of traditional broadcasting stations has dramatically increased,[18] and the ad-

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needs and problems affecting their local communities; (3) guidelines limiting the amount of allowable advertising; (4) the obligation that stations keep comprehensive program logs, and that those logs be available for public inspection; and (5) long-form audit procedures. *Id.* at 1076-78.

16. Memorandum Opinion and Order on Reconsideration, 104 F.C.C.2d 358, 371 (1986) [hereinafter *"Reconsideration Order"*], *rev'd in part sub nom.*, Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

The FCC issued this opinion after a number of interested parties, including Action for Children's Television ("ACT") and the National Association of Broadcasters ("NAB"), sought reconsideration and/or clarification of the *1984 Deregulation Order*. The *1984 Deregulation Order*, as clarified by the *Reconsideration Order*, is currently being reviewed by the FCC pursuant to the decision in *Action for Children's Television*, which remanded to the Commission that portion of the *1984 Deregulation Order* relating to commercialization guidelines. *Action for Children's Television*, 821 F.2d at 750. The Court of Appeals ruled that the FCC had failed to provide sufficient justification for its decision to delete those guidelines as they applied to children's television and remanded to the Commission "for further elaboration on that issue." *Id.*

17. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396 (1969). In closing, the Court stated, "[i]n view of the scarcity of broadcast frequencies . . . we hold the regulations and ruling at issue here are both authorized by statute and constitutional." *Id.* at 400.

In 1987, the FCC determined that the scarcity rationale underlying *Red Lion* was no longer applicable and therefore concluded that the Fairness Doctrine contravenes the first amendment. Syracuse Peace Council, 2 F.C.C. Rcd. 5043, 5057 (1987) (order and opinion); *aff'd on other grounds*, Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

18. In January 1975, there were 953 stations on the air; at the end of 1987, there were 1342. This 40% growth has resulted in households having a wide variety of choices in commercial stations. *See Commercialization of Children's Television: Hearings on H.R. 3966 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 276 (1988) [hereinafter *"Hearings"*] (statement of Wallace Jorgenson, President, Jefferson-Pilot Communications Co., and Chairman of the Joint Board of the NAB).

vent of cable television and video casette recorders ("VCR") have resulted in a highly competitive market that provides children and parents with an abundance of choices.[19]

In light of this dynamic and competitive market, the FCC's *1984 Deregulation Order* determined that the marketplace was adequately protecting children from "overcommercialization." The Commission's precise reasoning was that "if stations exceed the tolerance level of viewers by adding 'too many' commercials, the market will regulate itself, *i.e.*, the viewers will not watch and the advertisers will not buy time."[20]

Following the FCC's *1984 Deregulation Order*, a number of groups, principally Action for Children's Television ("ACT"), began pressing Congress to reinstate the Commission's guidelines for television, particularly the guidelines for children's programming set forth in the *1974 Policy Statement*. The premise for such regulation is the same as the premise underlying the *1974 Policy Statement*: that "spectrum scarcity" requires the Commission to regulate actively in the area of children's television.[21]

In the resulting Children's Television Act of 1988, Congress agreed with ACT that "commercialism" had increased since 1984 and concluded that "total reliance on marketplace forces is not sufficient to protect children from potential exploitation by advertising or commercial practices."[22] The House Report accompanying the Act explicitly noted the Act's goal of turning back the clock:

> The purpose of this legislation is much the same as that reflected by the FCC's policy in 1974: "to protect the interest of children by limiting the amount of commercial matter presented during children's programs to the greatest extent

19. In 1974, the VCR had not even been introduced in the United States; today, 59% of all households with children under 12 years of age have at least one VCR. Cable television also plays a major role today in children's viewing habits. AGB Television Research shows that 52.7% of television households with children under 12 have cable television service. *Hearings, supra* note 18, at 289-92 (report of Richard V. Ducey, Ph.D., submitted by Wallace Jorgenson, President, Jefferson-Pilot Communications Co., and Chairman of the Joint Board of the NAB).

20. *1984 Deregulation Order*, 98 F.C.C.2d at 1105 (footnote omitted).

21. See *supra* note 17 and accompanying text.

22. H.R. REP. NO. 675, 100th Cong., 2d Sess. 8, 134 CONG. REC. H3979-80 (daily ed. June 7, 1988). Although the House Report accompanying the Act recognized the new media available today for children, it concluded, without explanation, that these alternatives did not obviate the public interest responsibility of individual broadcast licensees. *Id.*

possible without negatively impacting the viability of children's programming on commercial television."[23]

The First Amendment Context

The fallacy of any congressional desire to return to the days of the *1974 Policy Statement* is demonstrated not only in the recent explosion of competing media, but also by the substantial changes in first amendment law which have occurred since 1974. In considering the Act, Congress relied heavily on the FCC's *1974 Policy Statement* for conclusions that children are "far more trusting of and vulnerable to commercial 'pitches' than are adults" and that "the public interest does not protect advertising which is substantially in excess of the amount" needed to produce children's programs.[24] Congress, however, was insensitive to the fact that the Commission's 1974 conclusions were reached in a first amendment context radically different from that of today.

The *1974 Policy Statement* rested explicitly upon the premise that "commercial speech has little first amendment protection."[25] That conclusion was based on the then-prevailing Supreme Court view, enunciated in *Valentine v. Chrestensen,*[26] that "the Constitution imposes no restraint on government as respects purely commercial advertising."[27] The view that commercial speech falls outside of first amendment purview, however, has *not* been the law since the Supreme Court's 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.*[28]

In *Virginia Pharmacy,* the Court repudiated the *Chrestensen* dogma[29] and invalidated a state statute which prohibited pharmacists from advertising prices of prescription drugs. The Court found that suppression of "truthful information about entirely lawful activity" was repugnant to the first amendment.[30] Since 1976, the Court has consistently invalidated re-

23. *Id.* at 9.

24. *Id.* at 7, 9.

25. *1974 Policy Statement*; 50 F.C.C.2d at 10.

26. 316 U.S. 52 (1942) (refusing to enjoin enforcement of ordinance against street distribution of handbills containing commercial matter).

27. *Id.* at 54.

28. 425 U.S. 748 (1976).

29. *Id.* at 760-61.

30. *Id.* at 773. The Court noted the importance of commercial speech in American society, stating:

strictions intended to deprive consumers of accurate information about products and services that are, and traditionally have been, lawful.[31]

Of course, the courts have long recognized Congress' authority generally to regulate broadcasting "in the public interest, convenience and necessity" by means of FCC rules and regulations.[32] In addition, the Supreme Court has recognized congressional power to regulate programming aimed at children, even where the exercise would be prohibited by the first amendment if the programming were aimed at adults.[33] Nevertheless, to recognize congressional authority to institute appropriate regulations in the area is not to concede that Congress may regulate in whatever manner or degree it pleases.

The Supreme Court set forth an explicit statement of the standards for first amendment protection of commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*[34] In *Central Hudson,* the Court ruled that New York State could not ban utility advertising that promoted consumer use of electricity. Justice Powell, writing for the Court, formulated a four-part test for determining whether a proposed restriction on commercial speech passes constitutional muster:

> Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest . . . . Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price . . . . It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 764-65.

31. *See* Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986); Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988) (invalidated a restriction on direct mail efforts by attorneys); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (struck down an attorney advertising restriction); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) (invalidated postal regulation which banned from the mails unsolicited advertisements for contraceptives); *In re* R.M.J., 455 U.S. 191, 203 (1982) (invalidating regulations on lawyer advertising); States v. State Bar of Arizona, 433 U.S. 350 (1977) (invalidated ban on advertising of prices by private attorneys); Linmark Assoc., Inc. v. Willingboro, 431 U.S. 85 (1977) (struck down an ordinance prohibiting the posting of real estate "For Sale" signs). *See also* Carey v. Population Services Int'l, 431 U.S. 678 (1977) (invalidating restrictions on contraceptive advertising).

32. *E.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388-89 (1969).

33. F.C.C. v. Pacifica Foundation, 438 U.S. 726, 749 (1978); Ginsburg v. New York, 390 U.S. 629, 639-40 (1968).

34. 447 U.S. 557 (1980).

1. Whether the activity being advertised is lawful and free of misleading claims;
2. Whether the government has a substantial interest favoring restriction;
3. Whether the restriction directly advances that substantial governmental interest; and
4. Whether the restriction is no more extensive than necessary to further the governmental interest.[35]

Central Hudson's standards provided the framework for evaluation of proposed restrictions on commercial speech in a series of Supreme Court decisions since 1980.[36] The Supreme Court re-affirmed the *Central Hudson* standards in *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico,*[37] which upheld a Puerto Rican statutory restriction intended to permit advertising for local casinos except where the advertising was intended exclusively for an audience of Puerto Rican residents. Although some proponents of restrictions on commercial speech have argued that the strength of *Central Hudson* did not survive *Posadas,* a careful review of the case suggests that this is not so. The *Posadas* Court explicitly relied on the standards set forth in *Central Hudson.*[38] Admittedly, the Court's inquiry into the *Central Hudson* test was less searching than in prior cases, but this may be explained by the unique procedural posture and social context surrounding the case. First, *Posadas* presented a challenge limited to the facial validity of the statute, not to the statute as applied. Also, the statute at issue had originally been promulgated in 1948 as part of the Commonwealth's decision to legalize casino gambling on the island and, in reaching its holding, the Court expressly noted "the unique cultural and legal history of Puerto Rico."[39] Finally, the Court pointedly relied on the fact that "the vast majority of the 50 States . . . prohibit casino gam-

35. *Id.* at 566. *Central Hudson* set forth the final part of its standard in terms of whether the government restriction was "no more extensive than necessary." Since then the Court has clarified that the standard requires that the government's means be "narrowly tailored" to achieve the desired ends. Board of Trustees of the State University of New York v. Fox, — U.S. —, 57 U.S.L.W. 5015, 5018 (June 29, 1989).

36. *See In re* R.M.J., 455 U.S. at 203-207; *Bolger*, 463 U.S. at 68-75; *Zauderer*, 471 U.S. at 644-47; *Posadas*, 478 U.S. at 343; *Shapero*, 108 S. Ct. at 1921; Board of Trustees of the State University of New York v. Fox, — U.S. at —, 57 U.S.L.W. at 5015.

37. 478 U.S. 328 (1986).

38. *Id.* at 340-44.

39. *Id.* at 339 n.6.

bling."[40] At bottom, *Posadas* can best be understood as an application of *Central Hudson*'s standards in a special context, involving a product that had been unlawful far longer than it had been lawful, and restrictions on advertising that were part and parcel of a legislative decision to legalize the product.

Viewing *Posadas* in this light, one can clearly see its inapplicability to the circumstances of children's programming. Television programs aimed at children have always been lawful and the advertising supporting such programming has always been viewed as a worthy means of providing the financial support needed to continue the programming. Indeed, Congress noted in the Act the lawful purposes of broadcast advertising to children, while explicitly finding that "the financial support of advertisers assists in the provision of programming to children."[41] Additionally, in the 1987 Court of Appeals decision remanding the children's programming portions of the *1984 Deregulation Order* to the FCC, the court expressly recognized that "it is clear that any regulation of programming must be reconciled with free speech considerations."[42]

The first amendment protection afforded commercial speech requires any governmental restriction on advertising to be evaluated against the tests set forth in *Central Hudson*. What follows is an analysis under *Central Hudson* of each of the substantial proposals incorporated either directly or indirectly into the Act.

Time Limits for Advertising During Children's Programming

Section 3(b) of the Act required "commercial television broadcast licensees to limit the duration of advertising in children's programming . . . to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays . . . ." As a result of the Act's facial restriction on commercial speech, the *Central Hudson* standards require the government to demonstrate a substantial need for the regulation before such a limitation can pass constitutional scrutiny.[43]

40. *Id.* at 341.

41. H.R. 3966, 100th Cong., 2d Sess., § 2(3), 134 CONG. REC. H3739-80 (daily ed. June 7, 1988).

42. Action for Children's Television v. F.C.C., 821 F.2d 741, 743 n.1 (D.C. Cir. 1987).

43. *Central Hudson*, 447 U.S. at 566.

Based upon the hearing record adduced in connection with the Act, it is doubtful that Congress made the requisite showing.

There is nothing inherently or per se harmful about the advertising of products or services on television. Critics of particular types of advertising are typically motivated by an opposition to particular products and are attacking the advertising only because of the legislative impracticality of banning the products themselves. Yet, the first amendment precludes using restrictions on advertising as indirect substitutes for restrictions on the sale of products themselves.[44] Absent a clear showing of harm to children—and therefore "a substantial government interest" in minimizing that harm—no restrictive regulation can withstand constitutional scrutiny under *Central Hudson.* The current evidence on advertising in and around children's programming fails to meet this burden. Proponents of the Act frequently state that excessive commercialization is detrimental to children,[45] but the evidence is far from convincing and fails to clearly show how the harm results.[46] Proponents of the Act argued that it is somehow "unfair" to advertise to children too young to discern the difference between programming and advertising.[47] However, there is vast disagreement regarding the age at which children discern the difference between programs and advertisements. There is no agreement about whether that lack of cognitive ability actually affects children in any substantive manner, and there is

44. As the Court emphasized in *Virginia Pharmacy Board*, restrictions on the flow of commercial information cannot be justified by a "paternalistic approach" of having the government rest its restriction "on the advantages of [its citizens] being kept in ignorance." 425 U.S. 752, 769-70 (1942).

45. *Hearings, supra* note 18, at 197-98 (testimony of Dr. Ellen Wartella, Research Associate Professor, University of Illinois, representing Society for Research in Child Development); *id.* at 94, 102-108 (testimony of Dale Kunkel, Professor, University of California, Santa Barbara).

46. Although there is evidence that "young children" may be unable to differentiate between advertising and programming, evidence as to what "harmful" effects might result is, at best, very inconclusive. Indeed, reliable evidence exists that young children can perceptually discriminate between programs and commercials and can discern the purposes of advertising. *See* WARD, WACKMAN & WARTELL, HOW CHILDREN LEARN TO BUY 54 (1977). *See also* WARD & WACKMAN, EFFECTS OF TELEVISED ADVERTISING ON CONSUMER SOCIALIZATION 46 (1973).

47. H.R. REP. No. 675, 100th Cong., 2d Sess. 7 (1988) (relying on the *1974 Policy Statement*); *Hearings, supra* note 18 at 340 (statement of the New York City Dept. of Consumer Affairs); *id.* at 189-98 (statement of Dr. Ellen Wartella, Research Associate Professor, University of Illinois, representing Society for Research in Child Development); *id.* at 97-99 (statement of Dale Kunkel, Professor, University of California, Santa Barbara).

no evidence that parents fail to provide an effective check on the desires of their children to buy products advertised during children's shows.[48]

Even if one accepts the theory that regulating children's programming will advance a substantial interest in preventing "harm" or "unfairness" to children, any proposal to limit advertising in children's programming to 9.5 minutes or 12 minutes per hour must be shown to "directly advance" this interest.[49] Ironically, an argument made in support of the Act—that its time restrictions were either at, or not far from, present practices—suggests that the Act attempts little to "directly advance" any asserted government interest. Of course, any "harm" that advertising per se is assumed to cause children would continue to occur during the advertising periods permitted under the Act.[50]

Furthermore, the Act's limits on commercials do not appear to meet *Central Hudson*'s fourth and final requirement that a regulation be "no more extensive than necessary to further the governmental interest."[51] First, it is questionable whether such regulation is truly necessary at this time, as the current marketplace acts to minimize excessive commercialization. While some complain that commercial levels during children's programming have increased following the *1984 Deregulation Order*,[52] most studies show that the majority of commercial

48. DISSENTING VIEWS ON H.R. 3966, THE CHILDREN'S TELEVISION ACT, H.R. REP. NO. 675, 100th Cong., 2d Sess. 20-21 (1988).

49. *Central Hudson*, 447 U.S. at 566.

50. This is not the first time that an argument has been advanced that advertising to children is somehow "unfair." In 1978, the Federal Trade Commission staff advanced the notion that to the extent advertising was "unfair" when directed at children, it could be effectively dealt with by means of a total ban on such advertisements. In 1980, Congress, recognizing the first amendment law that truthful advertising for a lawful product or service cannot be restricted except under specific and stringent conditions, forbade the Commission to go further unless it could support a finding of deception. *See* 15 U.S.C. 57a, § 11(a)(1)(i). In light of this directive, the Commission terminated its rulemaking, stating: "The staff has suggested that the only effective remedy for the problems allegedly posed by child-oriented television advertising would be a ban on all advertisement aimed at young children, but concludes that such a remedy could not be implemented as a practical matter since its coverage would be both over and under-inclusive." Children's Television Advertising, 46 Fed. Reg. 48,710, 48,714 (1981) (termination of rulemaking proceeding).

51. *Central Hudson*, 447 U.S. at 566.

52. H.R. REP. NO. 675, 100th Cong., 2d Sess., 8-9 (1988); *Hearings*, *supra* note 18 at 93-94, 110-17 (testimony and report of Dale Kunkel, Professor, University of California, Santa Barbara).

TV stations are, in fact, at or below the level which the Act would have mandated.[53]

Additionally, strong arguments can be made that a limited lifting of antitrust regulations would provide a less intrusive means of dealing with concerns about "excessive" advertising to children. Currently, the antitrust restrictions prohibit broadcasters and others from adopting a self-regulation scheme such as the one promulgated by the National Association of Broadcasters ("NAB").[54] Prior to 1982, the NAB had provided an industry code which included restrictions on the quantity, type and placement of children's advertising (the "Code"). The Code contained limitations similar to those in the Act on the number of advertisements permitted during children's programming.[55] In practice, the Code Authority, which was established pursuant to the Code, exercised final control over advertising because neither the networks nor most local stations would air non-Code approved commercials.

The Department of Justice, however, brought an end to self-regulation when it maintained an antitrust action against the NAB and its members.[56] The resulting consent judgment pro-

53. A survey conducted by the National Association of Broadcasters (NAB) found that the average children's program contained slightly more than 8.5 minutes per hour of commercial advertising and that 9 out of 10 programs contained fewer than 12 commercial minutes per hour. E. Cohen, "NAB Children's Television Commercialization Survey," Research and Planning Department, National Association of Broadcasters (February 1988) (available from NAB); *Hearings, supra* note 18, at 279 (statement of Wallace Jorgenson, President, Jefferson-Pilot Communications Co., and Chairman of the Joint Board of the NAB).

Proponents of the Act rely on a study conducted by Dale Kunkel, a professor at the University of California, Santa Barbara, to support their contention that advertising has increased since the FCC's *1984 Deregulation Order*. The Kunkel study, however, confirms the data found by the NAB. An examination of the Kunkel study shows that when one eliminates public service announcements, promotions for upcoming programs, and news snippets from the "non-program material," the stations surveyed averaged 10.5 minutes of product ads, approximating the guidelines in the Act. *See id.* at 26-27 (statement of Preston R. Padden, President, ITVA).

54. The suggestion presented here was, in fact, proposed by Representative Thomas J. Tauke in H.R. 4125, which would have allowed an antitrust exemption to broadcasting entities for the purpose of developing and disseminating voluntary guidelines on the scope of children's broadcast advertising.

55. Under the NAB Code, advance scripts and storyboards, as well as final commercials, were subjected to review and approval by the NAB Code Authority. *See* United States v. Nat'l Ass'n of Broadcasters, 536 F. Supp. 149 (D.D.C. 1982).

56. *Id.* The Justice Department alleged that the broadcasters' limits on children's programming commercials restricted the supply of commercial availability and, hence, increased prices. *Id.* at 152. The court denied the defendant's motion for summary judgment with respect to the time standards and program interruption

hibits broadcasters from "adopting, maintaining, promulgating, publishing, distributing, enforcing, monitoring or otherwise requiring or suggesting adherence to, any code, rule, bylaw, standard or other provision limiting or restricting: (1) the quantity, length or placement of non-program material appearing on broadcast television . . . ."[57] In other words, since 1982, broadcasters have been prohibited from agreeing among themselves to limit the amount of commercial material aired in and around children's programs.[58]

By allowing the industry itself to deal with specific issues regarding "excessive commercialization," Congress could achieve the purported goal of the Act with less intrusive interference with first amendment rights. Although some opponents will always argue that market forces are inadequate to meet the Act's goals, the evidence suggests that Congress should certainly consider this less restrictive alternative to the Act. *Central Hudson* suggests that any viable self-regulatory means of approaching the issue must be preferred to the governmental intrusions mandated in the Act.

The Act's Rulemaking Requirement and Program Length Commercials

Section 3(a) of the Act provided:

> Rulemaking on Commercial Time Required.—The Federal Communications Commission shall, within 30 days after the date of enactment of this Act, initiate a rulemaking proceeding to prescribe standards applicable to commercial television broadcast licensees with respect to the time devoted to commercial matter in conjunction with children's television programming.

The rulemaking requirement of the Act gives the Commission power to set commercial time limits but completely fails to give guidance on the issue of how to categorize animated features involving cartoon characters simultaneously marketed as products. Opponents of this advertising practice call these

standards. *Id.* at 170. Thereafter, the parties entered into a consent decree. *See* United States v. Nat'l Ass'n of Broadcasters, 553 F. Supp 621, 622 (D.D.C. 1982).

57. *Nat'l Ass'n of Broadcasters*, 553 F. Supp. at 626.

58. Some have also opposed reinstitution of the Code on the basis that it is essentially "a back-door device for delegating [to the NAB] authority to administer a legislative policy of First Amendment transgression." *Hearings*, *supra* note 18, at 232 (testimony of Gilbert H. Weil, general counsel of the Association of National Advertisers).

"program length commercials." Clearly, if limitations are to be established by the Commission regarding the number of minutes of "commercials" which can be shown in a given half-hour, any program defined entirely as "commercial" would effectively be banned. While no one has yet been able to provide a reasoned definition of what exactly constitutes a "program length commercial,"[59] proponents of such a ban argue that so-called "toy driven" shows are detrimental to children.

Such an argument clearly goes too far. These programs can and do stand alone on their ability to entertain. Neither is there something inherently undesirable about a program that features characters that may simultaneously be sold as products. A wide variety of highly acclaimed children's programs, ranging from "commercial" programs (such as Walt Disney broadcasts) to various "non-commercial" programs (such as *Sesame Street*), have been and continue to be associated with specific products.[60] If a show provides entertaining and informative programming, its sponsors should not be precluded from selling toys which replicate characters in the programming, either during the program itself or at other times. To hold otherwise would deal a severe blow to much current children's programming.

Contrary to the contentions of opponents to "commercial programs," children are not so gullible that they continue to watch a program that does not have sufficient entertainment value.[61] This is borne out by the declining audience for "action

59. One must question whether there exists any rational and constitutional means by which the FCC or Congress can distinguish this kind of programming. It may well be that, if any method exists, it is best pursued in a forum like an FCC Rulemaking which is already pending, which at a minimum allows extensive public comment and analysis before dramatic encroachments into first amendment rights are taken. *See In re* Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 2 F.C.C. Rcd 6822, ¶23 (1987) (further notice of inquiry and notice of proposed rule making).

60. Indeed, Sesame Street—which is perhaps the most acclaimed program broadcast for the children's audience—has been reported to derive approximately two-thirds of its revenue from dolls, puppets, games, books, clothing, and other products. Blau, "Mum's the Word, But Sesame Street is Turning 20," N.Y. Times, Nov. 14, 1988, at C13, col. 5.

61. As one noted commentator recently stated:

> We must stop treating children as helpless, gullible sheep who need to be carefully watched and protected. There is no evidence that television is the wolf in sheep's clothing that is slowly devouring our children, though many

figure" programs and the greater demand for family-oriented or standard cartoon programs.[62] Because the audience determines the success or failure of children's programming, the marketplace will react to such findings and will eliminate programs that are not sufficiently entertaining to sustain an audience.

The Act's Requirement that Licensees Serve the Interest of Children

The last provision of the Act required the FCC to consider, in reviewing renewal applications, "whether the licensee had served the educational and informational needs of children in its overall programming."[63] If the Act is simply reiterating the Commission's long-standing policy that broadcasters have a responsibility to major segments of its audience, then the regulation is superfluous because it does nothing to change existing law.[64]

If, instead, the Act is intended to push the FCC beyond its present practices, the broad wording of the provision offers little guidance for broadcasters or the Commission. Re-licensing issues are complex and varied and the Act omits any standards for such inevitable factual issues as: (i) what children are a part of the broadcaster's audience; (ii) what are the "educational and informational" needs of those children and how are they to be measured; (iii) what measures define a broadcaster's "overall programming;" and (iv) what standards, whether qualitative or quantitative, will define sufficient "service" of children's needs.

If the review provision is actually a trial balloon for future congressional mandates of specific quantities of educational

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> critics would have you believe that. Children are not that easy to entertain or persuade, they will not watch [everything] put in front of them on television, and will not buy [or ask to buy] everything that is cleverly advertised to them. In reality, children are intelligent, discriminating, and skeptical. Despite their lack of experience, they are not that easily fooled.

C. SCHNEIDER, CHILDREN'S TELEVISION: THE ART, THE BUSINESS, AND HOW IT WORKS 2 (1987).

62. *Hearings*, *supra* note 18, at 280-281 (statement of Wallace Jorgenson, President Jefferson-Pilot Communciations Co., and Chairman of the Joint Board of the NAB).

63. H.R. 3966, 100th Cong., 2d Sess. § 4(2), 134 CONG. REC. H3979-80 (daily ed. June 7, 1988).

64. *See* 1984 Deregulation Order, 98 F.C.C.2d 1076, 1077 (1984); Reconsideration Order, 104 F.C.C.2d 358, 363-64 (1986).

and informational programming for children,[65] Congress should be forewarned that such initiatives would raise serious first amendment difficulties.[66] While proponents attempt to couch such regulation as "content-neutral," the inability to define what is "educational" or "informational"[67] would inevitably give the Commission supervisory control over programming content—in essence, a right to engage in program censorship, a concept long repugnant to the first amendment.[68]

Conclusion

Prior to its passage, proponents of the Children's Television Act of 1988 asserted that it did not go far enough to re-regulate the area of children's programming and advertising. The Act appeared to do little more than limit commercial time during children's shows to levels essentially the same as current practice and to direct broadcasters to continue to serve the needs of children. Upon closer review, however, the seemingly innocuous provisions of the Act raise substantial issues regarding the asserted need for the legislation, the scope of the restrictions proposed, and the wisdom of future rulemaking proceedings mandated without adequate congressional guidance. While President Reagan's veto message may not have fully explained the reasons for his opposition to the Act, the

65. Although not part of the final version of the Act, a requirement that broadcasters air a minimum of seven hours of educational and informational children's programming per week, was part of the bill as originally introduced. H.R. REP. NO. 675, 100th Cong., 2d Sess. 4, 134 CONG. REC. H3979-80 (daily ed. June 8, 1988).

66. In 1984, the FCC rejected mandatory programming requirements for children's television, based on the fundamental first amendment problems associated with the Commission's interference with broadcasters' editorial discretion, combined with the practicality of attempting to resolve problems of quality by mandating quantity. Children's Television Programming and Advertising Practices, 96 F.C.C.2d 634, 655-56 (1984) (report and order).

67. As the FCC has noted, "[J]udgments concerning the suitability of particular types of programs for children are highly subjective." *See* Nat'l Ass'n of Indep. Television Program Producers and Directors v. FCC, 516 F.2d 526, 539 n.21 (2nd Cir. 1975).

68. Numerous judicial opinions have noted that serious first amendment concerns are raised when regulation intrudes into broadcasters' programming judgments. *See Nat'l Ass'n of Indep. Television Producers*, 516 F.2d at 536 ("It may be that *mandatory* programming by the Commission even in categories would raise serious First Amendment questions . . . .") WNCN Listeners Guild v. FCC, 610 F.2d 838, 850-51 (D.C. Cir. 1979) ("There would no doubt be severe statutory and constitutional difficulties with any system that required intrusive governmental surveillance [or] dictated programming choices . . . ."). *See also* Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413, 1430 (D.C. Cir. 1983).

veto is entirely consistent with a careful approach to first amendment issues in the area of children's programming and commercial advertising. One hopes that those individuals and groups pressing for reenactment of similar legislation in 1989 will prove as sensitive to first amendment concerns as was President Reagan.